Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, COMMONWEALTH OF KENTUCKY and JEFFERSON COUNTY SHERIFF'S OFFICE
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is the determination of the eligibility for, and calculation of, State retirement benefits an attribute of State Sovereignty which is constitutionally protected from federal intrusion?

LIST OF PARTIES

Petitioners are Kentucky Retirement Systems, the Commonwealth of Kentucky and the Jefferson County Sheriff's Office. Respondent is the Equal Employment Opportunity Commission.

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Kentucky Retirement Systems, the Commonwealth of Kentucky, and the Jefferson County Sheriff's Office petition for a Writ of Certiorari to review the August 2, 2001 Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed in part, reversed in part the May 4, 2000 Memorandum Opinion and Order and the September 25, 2000 Order entered by the United States District Court for the Western District of Kentucky.

OPINIONS BELOW

The May 4, 2000 Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky and the September 25, 2000 Order are not published in any official or unofficial reporter. The Opinion of the United States Court of Appeals for the Sixth Circuit entered on August 2, 2001 is unpublished, but may be found at 2001 WL 897433 and 2001 U.S. App. LEXIS 17988.

JURISDICTION

This Petition seeks review of the Opinion of the United States Court of Appeals for the Sixth Circuit entered on August 2, 2001, which affirmed in part, reversed in part the Memorandum Opinion and Order entered by the United States District Court for the Western District of Kentucky on May 4, 2000 and the Order entered on September 25, 2000. There were no petitions for rehearing brought before the Sixth Circuit Court of Appeals and no orders granting the extension of time to file a Petition for Writ of Certiorari.

This Court has jurisdiction to review the Opinion of the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

This Petition raises a limited constitutional challenge against 29 U.S.C. § 623 (set forth in Appendix E) as it applies to a State retirement plan.

The two constitutional provisions relied upon to support this challenge are:

Article 1, Section 8 of the Constitution of the United States: (set forth in full in Appendix D)

> **Powers of Congress**
> The Congress shall have Power . . .
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

and

The Tenth Amendment to the Constitution of the United States:

> **Rights Reserved to States or People**
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Kentucky Retirement Systems ("Kentucky Retirement") administers the County Employees Retirement System, Kentucky Employees Retirement System and the State Police Retirement System, (collectively "the State retirement plan"), for the Commonwealth of Kentucky ("the Commonwealth") in accordance with the provisions of KRS 61.510 et seq. The employees of the Jefferson County Sheriff's Office ("Jefferson County") are members of the State retirement plan. Relying on 28 U.S.C. §§ 451, 1331, 1337, 1343, 1345 and 29 U.S.C. § 217 to invoke the jurisdiction of the District Court, the Equal Employment Opportunity Commission ("EEOC") brought suit in the United States District Court for the Western District of Kentucky against Kentucky Retirement as well as the Commonwealth and Jefferson County, challenging the statutory scheme under which Kentucky Retirement determines eligibility for, and the calculation of, disability retirement benefits.

The EEOC argued that the eligibility requirements and the manner in which disability retirement benefits are calculated under the State plan authorized by the Kentucky General Assembly are violative of the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("ADEA"). It contended that KRS 16.582, KRS 61.600, and KRS 61.605, in particular are discriminatory. The EEOC asked the court to order the Commonwealth to adopt "permanent legislation providing that KRS disability retirement benefits will be granted and calculated without regard to age." The EEOC also sought an award of monetary damages on behalf of a former employee of the Jefferson County Sheriff's Office, Charles Lickteig, as well as a class of individuals whose "monetary benefits" have allegedly been "unlawfully

withheld." Finally, the EEOC asked the Court to direct that "all individuals adversely affected" by the alleged unlawful practice be made "whole" through the use of "affirmative relief necessary to eradicate the effects" of the alleged unlawful practice, including but not limited to "reimbursement for the purchase of years of service," "permanent injunctive relief" and an order directing Petitioners to "carry out policies, practices and programs which provide equal employment opportunities for individuals forty (40) years of age or older."

Kentucky Retirement, relying on the Tenth and Eleventh Amendments to the United States Constitution and the principles of Federalism embodied therein, moved to dismiss the suit. The District Court denied the motion as well as parallel motions to dismiss filed by Jefferson County and the Commonwealth.

The matter was brought through three separate appeals to the Sixth Circuit Court of Appeals which exercised jurisdiction over the action pursuant to 28 U.S.C. § 1291 as modified by the collateral order doctrine. The Sixth Circuit Court of Appeals rendered an Opinion on August 2, 2001 affirming in part and reversing in part. It found that the District Court should have sustained the Tenth Amendment challenge to that portion of the Complaint wherein the EEOC sought to compel the Commonwealth to enact specific legislation. The Sixth Circuit noted "the EEOC cannot force the Commonwealth 'to enact permanent legislation providing that KRS disability benefits will be granted and calculated without regard to age.'" However, the Sixth Circuit rejected the contention that the remaining provisions of the

Complaint should have been dismissed as well, finding:

> [T]o the extent that the EEOC seeks Defendants' compliance with the ADEA, as well as relief on behalf of Charles Lickteig and those similarly situated for ADEA violations, Defendants are not entitled to immunity on either Tenth or Eleventh Amendment grounds.

This Petition seeks review of that portion of the Sixth Circuit Opinion which rejected the Tenth Amendment challenge to the remainder of the EEOC Complaint.

ARGUMENT

I. THE TENTH AMENDMENT PROTECTS ATTRIBUTES OF STATE SOVEREIGNTY FROM FEDERAL INTRUSION

Petitioners ask the Court to clarify the boundaries of Federalism, with this Petition posing the specific question of whether or not the determination of the eligibility for, and calculation of, State retirement benefits is an attribute of State Sovereignty reserved to the States by the Tenth Amendment. The issue is raised in the context of an attempt by the EEOC to force the Commonwealth to restructure its State retirement plan in accordance with the EEOC's reading of the ADEA.[1] Petitioners maintain that the Tenth Amendment does not

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1 Petitioners do not agree with the EEOC's construction of the ADEA, and if required to litigate the merits of the claim, will establish that the State statutory scheme does not violate the ADEA.

permit such federal intrusion into the Sovereignty of the Commonwealth of Kentucky.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The principles of Federalism embodied in the Tenth Amendment are clear: "[I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." New York v. United States, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408, 2417 (1992) (citations omitted). The judiciary's task is thus "to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power." New York v. United States, 112 S. Ct. at 2418.

As this Court is well aware, although the task is clear when a Tenth Amendment challenge is raised, the standards which are to be used are not yet well defined.[2] This Petition seeks a clarification as to how the principles of Federalism apply to a specific fact pattern which has tremendous significance to State-operated pension plans across the United States.

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[2] See New York v. United States, 112 S. Ct. at 2417 ("the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases"). The Court has acknowledged that its jurisprudence in this area "has traveled an unsteady path." New York v. United States, 112 S. Ct. at 2420 (citations omitted).

The Kentucky retirement plan was enacted by the General Assembly of the Commonwealth of Kentucky through the provisions of KRS 61.510 et seq. The EEOC has singled out several portions of that statutory scheme which it believes are violative of the ADEA. The EEOC's Complaint asked the trial court to enter an order directing the Commonwealth to adopt "permanent legislation providing that KRS disability retirement benefits will be granted and calculated without regard to age." Relying on New York v. United States, 112 S. Ct. 2408 (1992), the Sixth Circuit Court of Appeals ("Sixth Circuit") properly held that the Tenth Amendment to the United States Constitution serves as a bar to such relief. The Sixth Circuit held:

> [T]he EEOC cannot force the Commonwealth 'to enact permanent legislation providing that [Kentucky Retirement's] disability benefits will be granted and calculated without regard to age.'

Such holding was compelled by the directive of this Court in New York v. United States, 112 S. Ct. at 2420:

> Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'

Leaving no room for debate on this point, this Court observed that:

> [N]o Member of the Court has ever suggested that [a strong federal interest] would enable Congress to command a state government to enact state regulation. No matter how

> powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.

New York v. United States, 112 S. Ct. 2408, 2429 (1992) (emphasis in original).

This Court additionally recognized in Printz v. United States, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365, 2380 (1997) that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." The Court summarized its prior precedent on this point and succinctly stated the reasoning behind this prohibition:

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. See Texas v. White, 7 Wall., at 725. It is no more compatible with this independence and autonomy that their officers be 'dragooned' (as Judge Fernandez put it in his dissent below, 66 F.3d, at 1035) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

Printz v. United States, 117 S. Ct. 2365, 2381 (1997).

This basic tenet of Federalism is the stepping stone for addressing the Sixth Circuit's error in failing to dismiss the EEOC Complaint in its entirety. That portion of the Complaint wherein the EEOC seeks monetary damages and

affirmative relief against Petitioners in the form of injunctive relief and the compelled adoption of policies, practices and programs is just as violative of the Tenth Amendment as the provision seeking the forced enactment of legislation.

II. THE DETERMINATION OF THE ELIGIBILITY FOR, AND CALCULATION OF, STATE RETIREMENT BENEFITS IS AN ATTRIBUTE OF STATE SOVEREIGNTY

Although the Sixth Circuit found that the portion of the Complaint wherein the EEOC is seeking an order directing the Kentucky General Assembly to enact specific legislation was barred by the Tenth Amendment, it allowed the remaining counts of the Complaint to stand. The Sixth Circuit held:

> [T]o the extent that the EEOC seeks Defendants' compliance with the ADEA, as well as relief on behalf of Charles Lickteig and those similarly situated for ADEA violations, Defendants are not entitled to immunity on either Tenth or Eleventh Amendment grounds.

The court thereby failed to consider the fact that granting the EEOC the relief sought in the remainder of the Complaint will result in just as great an intrusion into the State Sovereignty as an Order directing the enactment of specific legislation. Either way, the Kentucky General Assembly is being compelled to comply with a federal directive in a matter constitutionally reserved to the States. Such a result is contrary to the Tenth Amendment. See Printz v United States, 117 S. Ct. 2365, 2373 (1997) ("[S]tate legislatures are

not subject to federal direction.") (emphasis in original); New York v. United States, 112 S. Ct. 2408, 2423 (1992) (The Constitution "confers upon Congress the power to regulate individuals, not states.").

A. Compliance With Any Court Order Responsive to the EEOC Complaint Requires the Enactment of State Legislation

The Sixth Circuit erred in viewing the monetary damage award and affirmative relief sought in the EEOC Complaint in the abstract. In order to perform a complete Tenth Amendment analysis, the Sixth Circuit should have considered what steps would be required to be taken by the Commonwealth in order to comply with a damage award and an injunction, and to avoid any further damage awards by adopting specified policies, practices and programs. It is readily apparent that those steps will necessarily include the forced enactment of legislation and thus will result in a usurpation of the powers of the Kentucky General Assembly.

There can be no depletion of the State retirement funds in payment of a damage award, no avoidance of any subsequent damage awards, and no adoption of specific policies, practices and procedures without a revision to the Kentucky statutory scheme to bring it in compliance with EEOC's construction of the ADEA. As administrator of the State retirement plan, Kentucky Retirement is bound by the directives of the Kentucky General Assembly which has specified through the statutory scheme who is eligible for retirement benefits and how those benefits are to be calculated. Kentucky Retirement can not informally restructure the State retirement plan in response to a court

order. On the contrary, compliance with a court order implementing the EEOC's construction of the ADEA and compelling the payment of retroactive and prospective damages and the adoption of certain policies, practices and programs must be effectuated through the enactment of State legislation. Accordingly, it makes no difference whether the relief sought by the EEOC seeks either an order compelling the enactment of legislation or an order compelling payment of monetary damages and directing affirmative relief. Under either scenario, compliance with the court order requires action by the Kentucky General Assembly as dictated by the EEOC.

The guidelines of New York v. United States, 112 S. Ct. 2408 (1992) and Printz v. United States, 117 S. Ct. 2365 (1997) do not permit such an intrusion upon the State Sovereignty. See New York v. United States, 112 S. Ct. at 2429 (recognizing that Congress can not do indirectly what the Tenth Amendment prohibits it from doing directly). The Sixth Circuit erred in relying on Reno v Condon, 528 U.S. 141, 145 L. Ed. 2d 587, 120 S. Ct. 666 (2000) and South Carolina v. Baker, 485 U.S. 505, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988) to reach a contrary result. In Reno v Condon 120 S. Ct. 666 (2000) and South Carolina v. Baker, 108 S. Ct. 1355 (1988), this Court acknowledged that the Tenth Amendment is not violated merely by requiring compliance with a federal directive duly enacted by the Congress under its Commerce powers which does not infringe on an attribute of State Sovereignty. The decisions are thereby dissimilar to the current fact pattern which additionally involves intrusion into an attribute of State Sovereignty.

In Reno v. Condon, 120 S. Ct. 666 (2000), the federal law challenged addressed the dissemination of personal information contained within motor vehicle records. As this Court noted:

> [T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Reno v. Condon, 120 S. Ct. at 672 (emphasis added).

Similarly, in South Carolina v. Baker, 108 S. Ct. 1355 (1988) the federal statute which was the subject of the constitutional challenge denied federal income tax exemption for interest earned on unregistered long-term state and local bonds. This Court found that the statute "regulates state activities; it does not . . . seek to control or influence the manner in which States regulate private parties." South Carolina v. Baker, 108 S. Ct. at 1362 (emphasis added).

In sharp contrast are the EEOC's efforts to utilize the ADEA to control the operation of a State retirement plan. Such efforts do in fact seek to direct the manner in which the State regulates private parties and unquestionably infringes upon a well-recognized attribute of State Sovereignty.

The suggestion that the Commonwealth could avoid this dilemma by simply choosing not to engage in the activity regulated by the ADEA, see South Carolina v. Baker, 108 S. Ct. at 1362, fails to take into account the realities of the State

retirement plan. In 1956,[3] long before the enactment of the ADEA, the Kentucky General Assembly adopted the provisions of KRS 61.510 et seq. establishing the State retirement fund. Under the literal terms of both the statutory scheme and the Constitution of Kentucky, the Kentucky General Assembly thereby entered into an inviolable contract with the members of the State retirement plan. (See § 19, Constitution of Kentucky and KRS 16.652, KRS 61.692 and KRS 78.852). The terms of that contract carefully balance the needs of the State retirement plan members against the obligation to maintain a viable retirement fund.

The Kentucky General Assembly can not at this late date choose to discontinue providing retirement benefits to its employees, notwithstanding the fact that compliance with the EEOC demands will upset the balance struck when the plan was designed. The Commonwealth can not either reduce or impair the benefits previously promised to its employees to offset the increased costs the Kentucky Retirement Plan would incur if forced to comply with the EEOC demands. (§ 19, Constitution of Kentucky). Absent a finding of a constitutional deficiency in this attempted enforcement of the ADEA, the Kentucky General Assembly must follow the directives of the EEOC regardless of any resulting harm to the financial integrity of the State retirement plan.

Under these circumstances, the Tenth Amendment compels federal deference to the State statutory scheme. In challenging the constitutionality of the application of the

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[3] The Kentucky Employees Retirement System was created in 1956. See KRS 61.515. The County Employees Retirement System and the State Police Retirement System were created in 1958. See KRS 78.520 and KRS 16.510.

ADEA to this particular fact pattern, Petitioners do not argue that the general enactment of the ADEA is outside Congress' Commerce powers.[4] However, even if the payment of retirement benefits can be considered to be an activity which has "a substantial relation to interstate commerce," see United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624, 1629-1630 (1995), such characterization is not dispositive of the issue regarding the boundaries of Federalism posed in this Petition. To the contrary, this Court has acknowledged that federal statutes involving matters over which Congress has legislative authority may nonetheless be found to be unconstitutional where they violate the principles of Federalism. See Reno v. Condon, 120 S. Ct. 666, 671 (2000), citing New York v. United States, 112 S. Ct. 2408 (1992) and Printz v. United States, 117 S. Ct. 2365 (1997).

"Congress exercises its conferred powers subject to the limitations contained in the Constitution." New York v. United States, 112 S. Ct. at 2418. The limitations arising from the dual sovereignty extended to the States must be invoked herein to strike down the application of the ADEA to the State retirement plan. Regardless of the relative viability of the ADEA, the limitations imposed by the principles of

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[4] Petitioners are of course aware of this Court's ruling in Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983), upholding the enactment of the ADEA as a valid exercise of the Commerce powers and its reaffirmation of that ruling in Kimel v. Florida Board of Regents, 528 U.S. 62, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000). Such precedent is not dispositive of the issue raised in this Petition, however, since the Court was not given the opportunity in either decision to address the specific issue of whether a State retirement plan is a unique attribute of State Sovereignty.

Federalism preclude the EEOC from relying upon it to control the internal operations of a State retirement plan.

B. Administering a State Retirement Plan is Truly Local in Nature

The Sixth Circuit erred in failing to recognize that the legislative process by which a State retirement system is created and managed is outside Congressional reach. "The Constitution requires a distinction between what is truly national and what is truly local." United States v. Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740, 1754 (2000). State retirement plans are "truly local;" they are established and administered in accordance with state statutory provisions which reflect the needs of their members and the particular State's financial capabilities. Decisions involving the administration of such plans are in an area of "traditional state concern" as that phrase was used by this Court in United States v. Lopez, 115 S. Ct. 1624, 1638 (1995). The principles of Federalism simply do not allow federal intervention into this attribute of State Sovereignty.

Federalism is of course deeply rooted in the nation's history. The Constitution "establishes a system of dual sovereignty between the States and the Federal Government." Gregory v. Ashcroft, 501 U.S. 452, 115 L. Ed. 2d 410, 111 S. Ct. 2395, 2399 (1991). The Tenth Amendment and the principles of Federalism which arise therefrom serve to protect such dual sovereignty.

"[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." United States v. Lopez, 115 S. Ct. at 1638 (citation omitted). "Although the States surrendered many of their powers to the new

Federal Government, they retained 'a residuary and inviolable sovereignty.'" Printz v. United States, 117 S. Ct. 2365, 2376 (1997) (citation omitted). "This separation of the two spheres is one of the Constitution's structural protections of liberty." Printz v. United States, 117 S. Ct. at 2378.

The historical roots and overwhelming significance of Federalism can not be overstated:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'

New York v. United States, 112 S. Ct. 2408, 2431 (1992).

> [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.

New York v. United States, 112 S. Ct. at 2421, quoting Texas v. White, 7 Wall. 700, 19 L. Ed. 227 (1869).

Accordingly, the principles of Federalism require "that Congress treat the States in a manner consistent with their

status as residuary sovereigns and joint participants in the governance of the Nation." Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240, 2263 (1999) (citation omitted). "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous, within their proper sphere of authority." Printz v. United States, 117 S. Ct. 2365, 2381 (1997) (emphasis added, citation omitted).

Up until the enactment of the amendment to the ADEA which extended its provisions to States, both Congress and the courts agreed that State retirement plans fell within the sphere of the States' authority. When Congress enacted the Employee Retirement Income Security Act ("ERISA") it provided a specific exemption for government plans. See 29 U.S.C. § 1003(b)(10). The legislative history of the Act confirmed Congressional concern over intruding into an area constitutionally allocated to the States. As Senator Lloyd Bentsen noted during the Congressional debates:

> State and local governments must be allowed to make their own determination of the best method to protect the pension rights of municipal and state employees. These are questions of state and local sovereignty and the Federal Government should not interfere.

Feinstein v. Lewis, 477 F. Supp. 1256, 1261 (S.D.N.Y. 1979), aff'd, 622 F.2d 573 (2d Cir. 1980).

The courts additionally recognized the constitutional basis for the exclusion of State pension plans from ERISA. "Plans established by state and local governments are generally excluded from coverage under ERISA because of

concerns of federalism." Feinstein v. Lewis, 477 Supp. 1256, 1261 (1979), aff'd, 622 F.2d 573 (2d Cir. 1980).

> Although applying ERISA to public pension plans was considered, Congress was reluctant to interfere with the administration of public retirement plans due to the resulting federalism implications.

Hightower v. Texas Hospital Ass'n, 65 F.3d 443, 448 (5th Cir. 1995) (citation omitted).

See also Roy v. Teachers Insurance and Annuity Ass'n, 878 F.2d 47, 49 (2d Cir. 1989) ("Mindful of the principles of federalism, . . . Congress opted to remove [public sector employee benefit plans] from ERISA's scope.") and Rose v. The Long Island Railroad Pension Plan, 828 F.2d 910, 914 (2d Cir. 1987), cert. denied, 108 S. Ct. 1112 (1988) ("This Congressional reluctance to interfere with the administration of public retirement plans is in part based on principles of federalism.").

The same compelling concerns of Federalism upon which the hands-off policy was premised when addressing the application of ERISA to the States are equally applicable herein. The EEOC Complaint presents a prime example of the dangers of federal intrusion in this sphere of authority. The paramount question which arises from the EEOC Complaint is how can Kentucky Retirement sufficiently fund its State retirement plan and simultaneously comply with the EEOC's demands. Certainly, resolution of that question requires consideration of "purely local" matters which have always been considered as "traditional" concerns of the State.

The structuring, funding and administration of a State retirement plan require consideration of matters over which the federal government has no interest and no expertise. These matters involve the intricacies of state employment and reflect the careful balance struck by the Kentucky General Assembly between preserving the State retirement fund and providing the necessary benefits to each of the members. The State alone has the knowledge and power to address such issues. As this Court has acknowledged:

> The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991), quoting The Federalist, No. 45, pp. 292-293 (C. Rossiter ed. 1961). The determination of who is eligible for State retirement benefits and how those benefits are calculated fall within the ambit of this definition. Accordingly, the Sixth Circuit erred in failing to hold that the EEOC is precluded by the Tenth Amendment from utilizing the ADEA to dictate to the Kentucky General Assembly how it should administer its State retirement plan.

CONCLUSION

Inasmuch as judicial enforcement of the Tenth Amendment is at the heart of Federalism, Petitioners, Kentucky Retirement Systems, Commonwealth of Kentucky and Jefferson County Sheriff's Office urge the Court to grant this Petition and address the issue of whether the relief being

sought under the EEOC Complaint extends beyond the boundaries of the Tenth Amendment.

Respectfully submitted on this 2nd day of October, 2001.

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KENTUCKY RETIREMENT SYSTEMS

APPENDIX A

No(s) 00-5664, 00-6366, 00-6367

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed August 2, 2001]
Leonard Green, Clerk

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
KENTUCKY RETIREMENT SYSTEMS; JEFFERSON COUNTY SHERIFF'S OFFICE; THE COMMONWEALTH OF KENTUCKY, Defendants-Appellants	)	**OPINION***

Before: JONES, DAUGHTREY, and COLE, Circuit Judges.

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R. GUY COLE, JR., Circuit Judge. Plaintiff-Appellant the Equal Employment Opportunity Commission ("EEOC") filed suit against Defendants-Appellants Kentucky Retirement Systems, Jefferson County Sheriff's Office, and the Commonwealth of Kentucky, challenging the manner in which Defendants calculate, and determine eligibility for, disability retirement benefits. The EEOC alleges that Defendants maintain a disability and retirement program that denies benefits, or pays reduced benefits, to individuals age forty or older in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. By order dated May 4, 2000, the district court denied Defendants' Fed. R. Civ. P. 12(b)(6) motions, which claimed immunity under the Tenth and Eleventh Amendments to the Constitution. In this consolidated interlocutory appeal, Defendants argue that the district court erred insofar as they are immune from suit as a matter of law under the Tenth and Eleventh Amendments. For the reasons that follow, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings.

BACKGROUND

Kentucky Retirement Systems ("KRS") administers a state retirement plan in accordance with the provisions of Ky. Rev. Stat. § 61.510 et seq. The EEOC filed a complaint against Defendants challenging Kentucky's statutory scheme on grounds that the eligibility requirements and the manner in which disability retirement benefits are calculated violate the ADEA.[1] The EEOC requested in relevant part that the district court: (1) grant a permanent injunction enjoining Defendants from engaging in any employment practice which discriminates on the basis of age against individuals forty years of age and older; (2) order the Commonwealth to enact permanent legislation providing that KRS disability retirement benefits will be granted and calculated without regard to age; (3) order Defendants to institute and carry out policies, practices and programs which provide equal employment opportunities for individuals forty years of age and older, and which eradicate the effects of their past and present unlawful employment practices; (4) order Defendants to make whole

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[1] The EEOC alleges that Ky. Rev. Stat. §§ 16.582, 61.600, and 61.605, in particular, are discriminatory. Section 16.582 codifies disability retirement provisions applying to Kentucky's State Police Retirement System, and §§ 61.600 and 61.605 set forth the provisions of disability retirement and allowance for other public employees. *See* KY. REV. STAT. ANN. §§ 16.582, 61.600, 61.605. Specifically, the EEOC claims that Defendants discriminate against a class of individuals age forty and older by (1) denying disability retirement benefits to individuals over age fifty-five in hazardous positions; (2) denying disability retirement benefits to individuals over age sixty-five in non-hazardous positions; and (3) paying lower disability retirement benefits to older workers with the same earnings and years of service as younger workers, based solely on age at the date of disability.

Charles Lickteig[2] and the class of individuals whose monetary benefits are being unlawfully withheld as a result of the acts complained of above, by restraining the continued holding of amounts owing as back benefits with prejudgment interest and recalculated future benefits, in amounts to be determined at trial; and (5) order Defendants to make whole all individuals adversely affected by the unlawful practices described above, by providing any other affirmative relief necessary to eradicate the effects of their unlawful practices, including but not limited to reimbursement for the purchase of years of service.

KRS, Jefferson County, and the Commonwealth moved to dismiss the complaint on grounds that its retirement plan falls within the residuary sovereignty of the State derived from the Tenth and Eleventh Amendments. The district court denied the motions, and by order dated November 2, 2000, we consolidated the cases for purposes of this appeal. Defendants argue on appeal that: (1) the Eleventh Amendment bars application of the ADEA to Defendants under *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000), despite the fact that the pending suit was brought by the EEOC rather than a private individual; and (2) the EEOC's lawsuit--in particular, its request for an order directing the Commonwealth "to enact permanent legislation" in

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[2] Lickteig was employed in a "hazardous duty" position for the Jefferson County Sheriff's Department, a participant in the County Employees Retirement System operated by KRS. When Lickteig became unable to work due to a disabling condition, he applied to KRS for disability retirement benefits. KRS notified Lickteig that under Kentucky law, he was ineligible for disability retirement benefits because of his age. Lickteig filed a charge with the EEOC, alleging age discrimination in violation of the ADEA.

compliance with the ADEA--violates sovereign immunity principles under the Tenth Amendment. We will address each argument in turn.

DISCUSSION

We review de novo a district court's denial of a motion to dismiss for failure to state a claim upon which relief can be granted. *See Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 865 (6th Cir. 2000). To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (internal quotations and citation omitted).

> We must treat as true all of the well-pleaded allegations of the complaint. All allegations must be construed in the light most favorable to the plaintiff. In order for a dismissal to be proper, it must appear beyond doubt that the plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint.

Bower v. Fed. Express Corp., 96 F.3d 200, 203 (6th Cir. 1996) (citations omitted).

I. Eleventh Amendment

The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. Thus, the Eleventh Amendment denies federal jurisdiction over suits against non-consenting States. *See College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 627, 670 (1999). The Supreme Court has recognized that Congress may abrogate States' immunity under the enforcement provision of § 5 of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 517 (1997); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). To do so, Congress must satisfy two requirements: (1) it must "unequivocally express[] its intent to abrogate immunity" and (2) it must act "pursuant to a valid exercise of power." *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) (internal quotation marks and citation omitted).

Here, Defendants concede that the first prong of this two-part inquiry is met in that Congress clearly expressed in the ADEA its intent to abrogate States' immunity. *See Kimel v. Florida Board of Regents*, 528 U.S. 62, 75-76 (2000). Defendants argue, however, that the second prong has not been met because the ADEA exceeds the scope of Congress's

§ 5 enforcement powers, and thus, the ADEA was not enacted pursuant to a valid grant of constitutional authority. Defendants rely on *Kimel*, a decision in which the Supreme Court held that the ADEA is not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment and that Congress therefore did not validly abrogate the States' sovereign immunity to suits by private individuals. *Id.* at 91. Unlike the case before us, however, *Kimel* involved an ADEA challenge brought by *private* individuals rather than a federal agency. The more appropriate analysis must begin with the Supreme Court's decision in *EEOC v. Wyoming,* 460 U.S. 226 (1983), *superseded by* 29 U.S.C.§ 623(j)), *as stated in Kopec v. City of Elmhurst,* 193 F.3d 894 (7th Cir. 1999).

In *Wyoming*, the Supreme Court considered the constitutional validity of Congress's extension of the ADEA to state and local governments. The Court addressed an ADEA action brought by the EEOC against the State of Wyoming and various state officials, challenging the state's policy of mandatory retirement of its game wardens at the age of fifty-five. The EEOC filed suit seeking relief on behalf of a game warden, who had been forced to retire, and other similarly situated individuals. In resolving a Tenth Amendment challenge, the *Wyoming* Court held that the ADEA constitutes a valid exercise of Congress's power under Article I's Commerce Clause, stating, "The extension of the ADEA to cover state and local governments, both on its face and as applied in this case, was a valid exercise of Congress's powers under the Commerce Clause." *Id.* at 243. The Supreme Court since has recognized, however, that Congress's power under the Commerce Clause does not include the power to subject States to suit at the hands of

private individuals. *See Seminole Tribe,* 517 U.S. at 72-73. Because *Wyoming* dealt with a challenge brought under Article I's Commerce Clause, the Court did not decide whether the ADEA also could be upheld as an exercise of Congress's powers under § 5 of the Fourteenth Amendment. *See Wyoming,* 460 U.S. at 243. That question was not addressed until *Kimel.*

Defendants argued that although *Kimel* addressed only States' immunity to suits brought by private individuals, the decision as a whole represents a general anathema of the ADEA as applied to the States. Defendants assert that *Kimel* clearly illustrates the Court's denouncement of Congress's attempt to apply the ADEA to the States:

> A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Although that lack of support is not determinative of the § 5 inquiry, Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's

> purported abrogation of the States' sovereign immunity is accordingly invalid.

. . . .

> State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision.

Kimel, 528 U.S. at 91. Defendants argue, "Given the strong statements in Kimel concerning the lack of a basis for authorizing suits by private individuals under the ADEA, [the] EEOC should not be permitted to circumvent the prohibition against suits by private individuals by suing for monetary damages in its name on their behalf."

Defendants' argument is without merit. The Supreme Court long has recognized that "States retain no sovereign immunity as against the Federal Government." *West Virginia v. United States,* 479 U.S. 305, 312 n. 4 (1987); *see also Monaco v. Mississippi,* 292 U.S. 313, 329 (1934) (holding that federal jurisdiction over "a suit by the United States against a State, albeit without consent of the latter . . . is inherent in the constitutional plan"). *In Seminole Tribe*, the Court recognized that notwithstanding States' immunity from private suits, "[t]he Federal Government can bring suit in federal court against a State" as a method "of ensuring the States' compliance with federal law." *Seminole Tribe,* 517 U.S. at 71 n.14. The Court reaffirmed this principle in *Alden v. Maine,* 527 U.S. 706, 755-56 (1999), when it addressed a

private suit brought against the state under the Fair Labor Standards Act ("FLSA"). While upholding Maine's assertion of sovereign immunity to defeat the private suit, the Court emphasized that such immunity does not insulate a state from an enforcement action brought by the federal government. *Id. at 755* ("In ratifying the federal Constitution, the States consented to suits brought by other States or by the Federal Government.").

It was according to this well-established principle that *Kimel* expressly limited the nature of its holding:

> Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits *by private individuals*.

Id. at 91 (emphasis added). Defendants do not dispute that as the federal agency charged with enforcing the ADEA's prohibition against discriminatory employment practices based on age, the EEOC has the authority to enforce the rights of employees who have been subjected to unlawful age discrimination. *See* 29 U.S.C. § 626. However, Defendants argue that the suit before us simply disguises an ADEA suit brought by a private individual and, therefore, is forbidden by the Eleventh Amendment. Defendants argue:

> In this regard, the action brought by the EEOC is indistinguishable from one brought by a private individual. Without question, if the

> monetary damage claim had been brought by Charles Lickteig or any other member of the alleged class, the holding in Kimel would compel its dismissal. The District Court erred in its belief that the substitution of the EEOC as plaintiff leads to a different result.

We agree that had the suit been brought by a private individual, it would be barred by the Eleventh Amendment. However, this suit was brought by the EEOC, a federal agency charged by Congress to enforce the ADEA's prohibition against discriminatory employment practices based on age. *See* 29 U.S.C. § 626. The EEOC has the authority to investigate alleged age discrimination and must "attempt to eliminate the discriminatory practices alleged, and to effect voluntary compliance" with statutory requirements "through informal methods of conciliation, conference, or persuasion." 29 U.S.C. § 626(a), (b). In the event that such efforts are unsuccessful, the EEOC is authorized to bring a civil enforcement action to obtain "such legal or equitable relief as may be appropriate to effectuate the purposes" of the statute, "including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability" for monetary relief in "[a]mounts owing to a person as a result of a violation." 29 U.S.C. § 626(b).

The Supreme Court has recognized that although "the EEOC is not merely a proxy for the victims of discrimination[,] . . . [w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *General Tel. Co. v. EEOC,* 446 U.S. 318, 326 (1980). In *Gilmer v. Interstate/Johnson Lane Corp.*, 500

U.S. 20 (1991), the Supreme Court noted that the EEOC has independent authority to investigate age discrimination and bring a civil enforcement action. *See id. at 28; see also EEOC v. Frank's Nursery & Crafts,* 177 F.3d 448, 458 (6th Cir. 1999) ("[T]he EEOC alone possesses the discretion as to how and when it shall carry out its administrative duties and thus does not function simply as a vehicle for conducting litigation on behalf of private parties.") (internal quotation marks and citation omitted). As recently observed by the Supreme Court in *Alden*:

> A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3, differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity. Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.

Alden, 527 U.S. at 755-56.[3]

Because the Eleventh Amendment does not shield a State from suit brought by a federal government agency to enforce a federal law, the district court properly denied Defendants immunity on Eleventh Amendment grounds.

II. Tenth Amendment

The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X. As illustrated below, the standard by which a State's claim to Tenth Amendment immunity is evaluated has "traveled an unsteady path." *New York v. United States*, 505 U.S. 144, 160 (1992).

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Supreme Court ruled that the Commerce Clause does not empower Congress to enforce the minimum wage

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[3] It also bears noting that the ADEA action at issue in the *Wyoming* case was brought by the EEOC on behalf of a private individual and sought declaratory and injunctive relief, back pay, and liquidated damages on behalf of the game warden, who had been forced to retire pursuant to the state's mandatory retirement statute, and others similarly situated. *See Wyoming*, 460 U.S. at 235. Theses [sic] facts are directly analogous to the case before us. The *Wyoming* Court did not consider the suit to be one disguised as an ADEA action brought by a private individual. *See id.* at 243-44.

and overtime provisions of the FLSA against the States "in areas of traditional governmental functions." *Id.* at 852. Following this decision, courts were required to identify "traditional governmental functions" in order to address claims of Tenth Amendment immunity. *See id.* Nearly ten years later, the Supreme Court expressly overruled *National League of Cities*, recognizing that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but inconsistent with established principles of federalism." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985). Rejecting "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular government function is integral or traditional," *id.* at 547, the Court emphasized that the role of the States in the federal system is guaranteed by the constitutional structure of the federal government itself rather than by external limits imposed on Congress's power via the Tenth Amendment, *see id.* at 547-51. *Garcia* determined that given the controls built into the constitutional framework itself, "[t]he political process ensures that laws that unduly burden States will not be promulgated." *Id.* at 556.

After *National League of Cities* but before *Garcia*, the Supreme Court decided *Wyoming*, holding that the ADEA did not violate state sovereignty under the Tenth Amendment and that Congress acted within its authority under the Commerce Clause when it extended the ADEA to cover state employees. *See Wyoming*, 460 U.S. at 243. Measured under the *National League of Cities* standard, the *Wyoming* Court held, "The extension of the ADEA to cover state and local governments, both on its face and as applied in this case, was a valid

exercise of Congress's powers under the Commerce Clause." *Id.*

Defendants argue that because *Wyoming's* Tenth Amendment analysis was based on *National League of Cities*, the Court's subsequent overruling of *National League of Cities* somehow calls into question the validity of *Wyoming*. As the EEOC points out, however, *Garcia* established a far less stringent standard than that articulated in *National League of Cities* to determine whether federal legislation under the Commerce Clause impairs state sovereignty under the Tenth Amendment. Thus, *Garcia* merely reinforced the Court's determination in *Wyoming* that Congress is constitutionally authorized to require state employers to abide by the ADEA.

Defendants also try to distinguish *Wyoming* by arguing that application of the ADEA to the State of Wyoming's mandatory retirement policy had neither a direct nor obvious negative effect on the State's finances, and thus, it created a much more limited intrusion into state sovereignty than in the present case. As Defendants provide no evidence to support this assertion, we are to assume that it in fact would be less of a financial burden to abandon a mandatory retirement age than to allow the ADEA to dictate the manner in which eligibility for, and amount of, disability benefits is determined. Although there might have been less of a financial burden imposed on the State in *Wyoming* than there would be in the present case, this point is not dispositive of Defendants' Tenth Amendment immunity claim.

Garcia is not the Supreme Court's final word on the Tenth Amendment, and we therefore must review the Court's more recent decisions in order to understand where the Court

has drawn the line between congressional action that violates state sovereignty and that which does not. Not long after *Garcia*, South Carolina raised a Tenth Amendment challenge to a federal statute that prohibited States from issuing unregistered bonds. *See South Carolina v. Baker*, 485 U.S. 505 (1988). The Court upheld the law because it merely regulated state activities, rather than sought to control or influence the manner in which States regulate private parties. *See id.* at 514-515.

Four years later, in *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court addressed a Tenth Amendment challenge to the federal Low-Level Radioactive Waste Policy Amendments Act, which provided three types of incentives "to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders." *Id. at 152.* In *New York*, the State argued that the Act impermissibly directed the States to regulate the field in contravention of the Tenth Amendment. The Supreme Court agreed insofar as one of the incentives, the "take title" provision, effectively coerced the States to administer the federal program in violation of Tenth Amendment state sovereignty. *See id.* at 174-76. The Court explained, "[T]his is not a case in which Congress has subjected a State to the same legislation applicable to private parties," but "instead concerns the circumstances under which Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.* at 160-61. In striking down the "take title" provision, the *New York* Court stated:

> Congress exercises its conferred powers subject to the limitations contained in the

> Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

Id. at 157-58. Because Congress lacks the authority to "command state legislatures to legislate," *id. at 179,* the Court held that requiring States to accept ownership of waste or to regulate according to instructions of Congress lies outside Congress's enumerated powers and is inconsistent with Tenth Amendment, *see id.* at 174-76. The Court emphasized, "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162.

In *Printz v. United States,* 521 U.S. 898 (1997), the Supreme Court applied this same Tenth Amendment analysis to invalidate a provision of federal law requiring state and

local law enforcement officers to conduct background checks on prospective handgun purchasers. The *Printz* Court stated:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. *The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.*

Id. at 935 (emphasis added).

The Court recently reaffirmed the distinction between generally applicable laws that regulate state activities in the same manner as private conduct and those that seek to control or influence the manner in which the States regulate private conduct. *See Reno v. Condon,* 528 U.S. 141 (2000). There, the Court upheld the constitutionality of the federal Driver's Privacy Protection Act ("DPPA"), which established "a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent." *Id.* at 144. *Condon* explained:

> In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth

Amendment. In *New York*, Congress commandeered the state legislative process by requiring a state legislature to enact a particular kind of law. . . . In *Printz*, we invalidated a provision of the Brady Act which commanded state and local enforcement officers to conduct background check on prospective handgun purchasers.

. . . .

We agree with South Carolina's assertion that the DPPA's provisions will require time and effort on the part of state employees, but reject the State's argument that the DPPA violates the principles laid down in either *New York* or *Printz*. We think, instead, that this case is governed by our decision in *South Carolina v. Baker*.

. . . .

Like the statute at issue in *Baker*, the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. *It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals*. We accordingly conclude that the DPPA is

> consistent with the constitutional principles enunciated in *New York* and *Printz*.

Id. at 149-51 (internal quotation marks and citations omitted) (emphasis added).

Here, Defendants point to section D of the EEOC's prayer for relief, which specifically requests that the district court "[o]rder Defendant Commonwealth to enact permanent legislation providing that KRS disability benefits will be granted and calculated without regard to age." Defendants argue that the EEOC cannot direct the Commonwealth "to enact permanent legislation," insofar as forcing the Commonwealth to do so would violate the Tenth Amendment. We agree.

The Supreme Court could not have been more clear on this point:

> [N]o Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

New York, 505 U.S. at 161, 178; *see also Printz,* 521 U.S. at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."); *Condon,* 528 U.S. at 149 ("While Congress has substantial powers to govern the Nation directly, . . . the Constitution has never been understood to confer upon Congress the ability to the require the States to govern according to Congress' instructions.").

Thus, the EEOC cannot force the Commonwealth "to enact permanent legislation providing that KRS disability benefits will be granted and calculated without regard to age." Indeed, as the parties agree, the Commonwealth is not even required to provide a disability retirement system. In the event that such a system exists, however, Defendants must award benefits without regard to age. Accordingly, to the extent that the EEOC seeks Defendants' compliance with the ADEA, as well as relief on behalf of Charles Lickteig and those similarly situated for ADEA violations, Defendants are not entitled to immunity on either Tenth or Eleventh Amendment grounds.

CONCLUSION

Accordingly, we REVERSE the district court's denial of immunity with regard to section D of the EEOC's prayer for relief and hold that Defendants are entitled to Tenth Amendment immunity from a mandate that it "enact permanent legislation," we AFFIRM the district court's denial of immunity in all other respects, and we REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 99-500

[Entered May 4, 2000]

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, PLAINTIFF,

v. **MEMORANDUM OPINION AND ORDER**

JEFFERSON COUNTY SHERIFF'S
OFFICE, KENTUCKY RETIREMENT
SYSTEMS, & THE COMMONWEALTH
OF KENTUCKY, DEFENDANTS.

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This matter is before the court upon a motion to dismiss by Kentucky Retirement Systems ("KRS") (No. 20). For the reasons stated below, the court will deny the motion.

The Equal Employment Opportunity Commission ("EEOC") brought this suit against the Kentucky Retirement Systems ("KRS"), alleging a violation of the Age Discrimination in Employment Act ("ADEA"). The EEOC claims that the KRS denies or reduces disability retirement benefits on the basis of age. The defendant's motion to

dismiss, however, concerns only the constitutionality of applying the ADEA to Kentucky's retirement plan for state employees. The KRS argues that the EEOC's claims are barred by the Tenth and Eleventh Amendments.

In 1974, Congress amended the Fair Labor Standards Act ("FLSA") to apply the ADEA to the states. 29 U.S.C. § 630(b). The amendment also permitted any employee to bring an ADEA action against his or her employer, including a public agency, in federal or state court. 29 U.S.C. § 626(b). The statute makes it unlawful for an employer to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

A. Eleventh Amendment

The Eleventh Amendment prohibits the extension of federal judicial power to a suit against a state by a citizen of another state. U.S. Const. amend. XI. The Amendment stands, however, "not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 54 (1996). Generally, the Amendment denies federal jurisdiction over suits against nonconsenting states. *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 119 S.Ct. 2219, 2223 (1999). Congress may, however, abrogate the states' immunity from suits based on federal laws if two requirements are met. First, Congress must "unequivocally express its intent to abrogate [the states'] immunity." Second, Congress must have acted pursuant to a valid grant of constitutional authority. *Seminole Tribe,* 517 U.S. at 55.

The defendant relies heavily on *Kimel v. Florida Board of Regents,* 120 S.Ct. 631 (2000). In that case, private individuals brought an ADEA suit against their employer, the state of Florida. The Supreme Court held that, in passing the ADEA, Congress made its intention to abrogate the states' immunity unmistakably clear. The issue before the Court, therefore, was whether the extension of the ADEA to state governments was constitutionally valid.

In *EEOC v. Wyoming,* 460 U.S. 226, 243 (1983), *superseded by statute as stated in Kopec v. City of Elmhurst,* 193 F.3d 894, (7th Cir. 1999), the ADEA was deemed a valid exercise of Congress's power under the Commerce Clause of Article I, § 8. The *Wyoming* Court held that the ADEA "did not transgress any external restraints imposed on the commerce power by the Tenth Amendment." *Id.* at 243. Because the Act was valid under Congress's Commerce Clause power, the Court declined to determine whether the Act "could also be supported by Congress's power under § 5 of the Fourteenth Amendment." That question was addressed in *Kimel,* where the court recognized that Congress's power to enact the ADEA under the Commerce Clause does not necessarily mean that Congress validly abrogated the states' immunity from suits brought by private individuals pursuant to the ADEA. Congress may, however, abrogate that immunity under the enforcement provision of § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976). The *Kimel* Court, therefore, concluded that private individuals may maintain ADEA suits against the states only if Congress properly exercised its legislative power under § 5 of the Fourteenth Amendment in passing the ADEA. *Kimel,* 120 S.Ct. at 643. The standard for determining whether § 5 permits abrogation of state immunity

from individual suits is whether there exists "a congruence and proportionality between the injury to be prevented or remedied [by the statute] and the means adopted [in the statute] to that end." *Id.* at 644. Concluding that the ADEA did not satisfy that standard, the Court held that Congress could not abrogate the states' immunity from ADEA lawsuits brought by individuals. However, the Court made the limited nature of its holding clear: "Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity *to suits by private individuals." Id.* at 650 (emphasis added). The defendant's contention that *Kimel* generally denounced the ADEA as applied to the states, therefore, is unfounded. *Kimel* stands only for the proposition that private individuals may not bring ADEA suits against their state employers.

This lawsuit is brought by the EEOC, not by private individuals. Therefore, *Kimel* does not squarely apply to this case. The defendant claims that an ADEA suit brought by the EEOC against a state merely disguises an ADEA suit brought by an individual against a state. According to the KRS, the EEOC's suit circumvents the Eleventh Amendment as well as *Kimel.* This court disagrees.

The Eleventh Amendment confirms that each state is a sovereign entity, not subject to private suits without its consent. *Seminole Tribe,* 517 U.S. at 54. States are not, however, immune from suits brought by the federal government to enforce state compliance with federal laws. *Principality of Monaco v. Mississippi,* 292 U.S. 313, 322-23 (1934). In ratifying the Constitution, the states constructively

waived some aspects of sovereign immunity. This waiver included consent to suits brought against the states by the federal government. *Alden v. Maine,* 119 S.Ct. 2240, 2267.

The EEOC is a federal agency authorized to sue employers for ADEA violations. 29 U.S.C. § 626. These suits are not brought to permit individuals to circumvent the Eleventh Amendment but to deter age discrimination. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (the ADEA was designed not only to address an individual's grievances, but also to further important social policies); *General Telephone Co. of the Northwest, Inc. v. EEOC,* 446 U.S. 318, 326 (1980) (the EEOC is not merely a proxy for victims of discrimination, but is guided by an overriding public interest in equal employment opportunity); *EEOC v. Frank's Nursey* [sic] *& Crafts, Inc.*, 177 F.3d 448, 458 (6th. Cir. 1999) (the EEOC is not merely a vehicle for conducting litigation on behalf of private parties and does not stand in their shoes, even when it seeks to recover backpay for them); *EEOC v. Johnson & Higgins, Inc.* 91 F.3d 1529, 1537 (2nd Cir. 1996) (there is a strong public interest in eradicating age discrimination).

Concededly, the Eleventh Amendment protects the states from suits brought by the federal government in a nominal capacity, where the real plaintiffs are private individuals. In *New Hampshire v. Louisiana,* 8 U.S. 76 (1883), the Supreme Court disallowed a suit based on a bond controversy between two states because the bond owners were the actual promoters and managers of the suits. The individuals directly funded the lawsuit and held exclusive settlement authority. Here, however, the EEOC is not litigating individuals' claims. Indeed, alleged discrimination

victims cannot even control whether the EEOC will sue. *Frank's Nursery,* 177 F.3d at 468. Because the agency's authority to bring suit under the ADEA is independent of the rights of private parties, this lawsuit is not a circumvention of the Eleventh Amendment.

B. Tenth Amendment

The Tenth Amendment provides that powers not delegated to the United States by the Constitution, "nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States,* 505 U.S. 144, 156 (1992). The defendant characterizes the power to establish a retirement plan for state employees as "an attribute of state sovereignty." According to the defendant, therefore, the EEOC's lawsuit violates the Tenth Amendment because it infringes upon Kentucky's state sovereignty.

The Supreme Court reconsidered the contours of the Tenth Amendment in *Garcia v. San Antonio Metro. Transit Sys.*, 469 U.S. 528 (1984), holding:

> We . . . now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or

> 'traditional.' . . . If there are to be limits on the Federal Government's power to interfere with state functions -- as undoubtedly there are -- we must look elsewhere to find them.

Id. at 547.

The *Garcia* Court found that limits on the federal government's power to interfere with state functions already existed within the structure of the federal government:

> [T]he principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

Id. at 556.

After *Garcia,* the Court acknowledged the "possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment." *South Carolina v. Baker,* 485 U.S. 505, 512 (1987). Such a defect exists, for example, where a federal law essentially coerces a state government to regulate pursuant to Congress's directives. *New York v. United States,* 505 U.S. 144, 177 (1992). "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161.

The EEOC's lawsuit does not "commandeer" Kentucky's legislative process. The ADEA does not even require Kentucky to enact a retirement system. This lawsuit alleges only that, if such a system exists, the benefits should be awarded without regard to age. The ADEA does not intrude upon the state activity of establishing a retirement system. "The State's discretion to achieve its goals in the way it thinks best is not being overridden entirely, but is merely being tested against a reasonable federal standard." *Wyoming*, 460 U.S. at 240 (1983). This lawsuit will not, therefore, violate the Tenth Amendment.

ORDER

For the reasons stated above, IT IS HEREBY ORDERED that the defendant's motion to dismiss is DENIED.

This the 2nd day of May, 2000.

/s/_____
Jennifer B. Coffman, Judge
United States District Court
Western District of Kentucky

Entered May 4, 2000
Jeffery A. Apperson, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 99-500

[Entered September 25, 2000]

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, PLAINTIFF,

v. **ORDER**

JEFFERSON COUNTY SHERIFF'S
OFFICE, et al., DEFENDANTS.

****

This matter is before the court upon the defendants' motions to dismiss or to alter or amend this court's May 4, 2000 order (Nos. 30 and 34).

The Equal Employment Opportunity Commission ("EEOC") alleges that the defendants violated the Age Discrimination in Employment Act ("ADEA"), 42 U.S.C. § 623(a)(1), by maintaining a disability retirement program which discriminates on the basis of age. In February 2000, the Kentucky Retirement System ("the System") filed a motion to dismiss which contended that the ADEA could not constitutionally apply to a state's retirement program in

light of the Supreme Court's ruling in *Kimel v. Florida Bd. of Regents,* 120 S.Ct. 631 (2000). On May 4, 2000, the System's motion to dismiss was denied. This court concluded that the ADEA is a constitutional abrogation of the states' Eleventh Amendment sovereign immunity and that the lawsuit does not unconstitutionally infringe upon state sovereign immunity under the Tenth Amendment.

On May 11,2000, the System filed a notice of interlocutory appeal of the denial of its motion to dismiss. After a notice of appeal is timely filed, a district court may not take any action which will alter the status of the case as it rests before the Court of Appeals. *Griggs v. Consumer Discount Co.*, 459 U.S. 56, 58 (1982). However, this court may proceed with matters in aid of appeal. *In re Grand Jury Proceedings Under Seal,* 947 F.2d 1188, 1190 (4th Cir. 1991).

Stating that they wish to join the System's interlocutory appeal, the remaining defendants now move for dismissal on the same grounds as those set forth in the System's motion to dismiss. By denying these motions, the court permits the defendants to consolidate their interlocutory appeals and aids the resolution of the System's pending appeal.

Accordingly, IT IS ORDERED that the defendants' motions to dismiss are DENIED for the same reasons as those set forth in this court's May 4, 2000 order.

IT IS FURTHER ORDERED that this action is STAYED pending resolution of the defendants'

interlocutory appeals. The stay shall be lifted upon notice from any party that the appeal has been resolved.

This the 22nd day of September, 2000.

/s/_____
Jennifer B. Coffman, Judge
United States District Court
Western District of Kentucky

Entered September 25, 2000
Jeffrey A. Apperson, Clerk

APPENDIX D

Section 8. Powers of Congress.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To continue Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Section 8. Powers of Congress

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces.

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; -- And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

APPENDIX E

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

....

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any

combination thereof to establish or maintain an employee pension benefit plan which requires or permits -

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan -

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced

as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination

in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411 (b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection -

(A) The terms "employee pension benefit plan","defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

. . . .

Supreme Court, U.S.
FILED
NOV 3 2001
OFFICE OF THE CLERK

No. 01-573

In the Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, ET AL.
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in determining, at this interlocutory stage, that the Tenth Amendment does not preclude this enforcement action brought by the federal respondent pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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In the Supreme Court of the United States

No. 01-573

KENTUCKY RETIREMENT SYSTEMS, ET AL.
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is unpublished, but the decision is noted at 2001 WL 897433 (Table). The orders of the district court (Pet. App. 22a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2001. The petition for a writ of certiorari was filed on October 2, 2001. The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a)(1), makes it "unlawful

for an employer * * * [to] discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." "The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. 630(*l*). "[E]mployer" expressly includes "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b). As amended by the Older Workers Benefit Protection Act of 1990 (OWBPA), 29 U.S.C. 623(f)(2)(B)(i), the ADEA permits an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker."

2. Respondent Equal Employment Opportunity Commission (EEOC) filed this action pursuant to the ADEA against petitioners Kentucky Retirement System (KRS), Commonwealth of Kentucky, and Jefferson County Sheriff's Office, claiming that petitioners maintain a disability and retirement program that denies or reduces benefits to individuals on the basis of age. The action arose from a discrimination charge filed by Charles Lickteig. Lickteig was employed in a "hazardous duty" position by the Jefferson County Sheriff's Department, a participant in the County Employees Retirement System operated by KRS. When Lickteig became unable to work due to disability, he applied to KRS for disability retirement benefits. KRS notified Lickteig that under Kentucky law, he was ineligible for disability retirement benefits because of his age.

Lickteig filed a charge with the EEOC, alleging discrimination in violation of the ADEA. Pet. App. 4a n.2.

After conducting an investigation and attempting to resolve Lickteig's discrimination charge, see 29 U.S.C. 626(b), respondent filed this ADEA enforcement action on behalf of Lickteig and a class of similarly situated individuals in the United States District Court for the Western District of Kentucky. Pet. App. 2a. The complaint alleges that the disability retirement program operated by KRS discriminates against individuals age 40 or older in violation of the ADEA in several ways, including by denying disability retirement benefits to individuals over age 55 in hazardous positions, see Ky. Rev. Stat. Ann. § 16.582(2)(b) (Michie 1996); denying such benefits to individuals over age 65 in non-hazardous positions, see *id.* § 61.600(1)(b); and paying lower disability retirement benefits to older workers with the same earnings and years of service as younger workers, solely because of the age of such workers on the date they become disabled, see *id.* § 61.605.

To remedy those alleged violations of the ADEA, respondent's complaint sought injunctive relief enjoining petitioners from engaging in unlawful employment discrimination based on age, and requiring petitioners to institute policies and practices providing equal opportunities for individuals age 40 and older, and redressing the continuing effects of unlawful employment practices. The complaint requested monetary relief to make whole Lickteig and similarly situated employees who were denied benefits or received lower benefits because of their age, in violation of the ADEA. Pet. App. 3a-4a. In addition, the complaint "specifically requests that the district court '[o]rder Defendant Commonwealth to enact permanent legislation provid-

ing that KRS disability benefits will be granted and calculated without regard to age.'" *Id.* at 20a.

3. The district court denied petitioners' motions to dismiss the complaint on the ground that they are entitled to complete immunity from suit under Tenth Amendment and Eleventh Amendment principles. Pet. App. 22a-32a. In considering petitioners' claim of immunity under the Eleventh Amendment, the court rejected petitioners' reliance on *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), reasoning that "*Kimel* stands only for the proposition that *private individuals* may not bring ADEA suits against their state employers." Pet. App. 25a (emphasis added). While "[t]he Eleventh Amendment confirms that each state is a sovereign entity, not subject to private suits without its consent," the court explained, "[s]tates are not * * * immune from suits brought by the federal government to enforce state compliance with federal laws." *Ibid.* Because this suit was "brought by the EEOC, not by private individuals," the court concluded that the suit is not barred by the Eleventh Amendment principles discussed in *Kimel*. *Ibid.*

The district court also rejected petitioners' claim that respondent's action was barred under the Tenth Amendment. Pet. App. 27a-29a. The court considered that claim under the principles developed in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *South Carolina* v. *Baker*, 485 U.S. 505 (1988); and *New York* v. *United States*, 505 U.S. 144 (1992), for determining whether legislation enacted pursuant to Congress's commerce power contravenes the Tenth Amendment. See Pet. App. 27a-28a. The court emphasized that the ADEA does not require States to enact retirement systems for state employees, but, as respondent has maintained in this case, requires "only

that, if such a system exists, the benefits should be awarded without regard to age." *Id.* at 29a. The court further determined that, in requiring state employers to comply with the ADEA, "[t]he State's discretion to achieve its goals in the way it thinks best is not being overridden entirely, but is merely being tested against a reasonable federal standard." *Ibid.* (quoting *EEOC* v. *Wyoming*, 460 U.S. 226, 240 (1983)).

4. The court of appeals in an unpublished opinion affirmed in part and reversed in part, and remanded for further proceedings. Pet. App. 1a-21a. The court affirmed the district court's ruling that "to the extent that the EEOC seeks [petitioners'] compliance with the ADEA, as well as relief on behalf of Charles Lickteig and those similarly situated for ADEA violations, [petitioners] are not entitled to immunity on either Tenth or Eleventh Amendment grounds." *Id.* at 21a. The court rejected petitioners' Eleventh Amendment immunity claim largely for the same reasons given by the district court, including "that *Kimel* expressly limited the nature of its holding" to comport with the "well-established principle" that Eleventh Amendment "immunity does not insulate a state from an enforcement action brought by the federal government." *Id.* at 10a.

In considering petitioners' Tenth Amendment claim, the court of appeals observed that in *EEOC* v. *Wyoming*, *supra*, this Court held that, as applied to state and local governments, "the ADEA did not violate state sovereignty under the Tenth Amendment," as understood in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruled by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Pet. App. 14a. The court of appeals rejected petitioners' argument that *Garcia* called into doubt the result in *Wyoming*, explaining that "*Garcia* established

a far less stringent standard than that articulated in *National League of Cities* to determine whether federal legislation under the Commerce Clause impairs state sovereignty under the Tenth Amendment." *Id.* at 15a. Thus, the court of appeals reasoned, "*Garcia* merely reinforced the Court's determination in *Wyoming* that Congress is constitutionally authorized to require state employers to abide by the ADEA." *Ibid.*

The court of appeals also evaluated petitioners' Tenth Amendment claim in light of this Court's subsequent decisions in *South Carolina* v. *Baker*, *supra*; *New York* v. *United States*, *supra*; *Printz* v. *United States*, 521 U.S. 898 (1997); and *Reno* v. *Condon*, 528 U.S. 141 (2000), and held that that claim lacked merit in all but one respect. With respect to the specific request in Section D of the complaint's prayer for relief for an order directing the State "to enact permanent legislation providing that KRS disability benefits will be granted and calculated without regard to age," the court concluded that "the EEOC cannot direct the Commonwealth 'to enact permanent legislation,' insofar as forcing the Commonwealth to do so would violate the Tenth Amendment." *Id.* at 20a. The court reversed the district court's denial of sovereign immunity in that particular respect, and remanded the case for further proceedings consistent with its decision. *Id.* at 21a.

ARGUMENT

Petitioners challenge the court of appeals' unpublished decision only insofar as it rejects their Tenth Amendment claim. That ruling does not conflict with any decision of this Court. Indeed, in *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), this Court rejected a similar Tenth Amendment challenge to the ADEA in the light of the then-governing, more sensitive Tenth

Amendment analysis established by *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). It follows *a fortiorari* that the ADEA satisfies the less rigorous standard adopted in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Petitioners do not allege any circuit conflict, nor could the unpublished decision below contribute to any such conflict. In addition, petitioners' Tenth Amendment claim is particularly ill-suited for review in its current interlocutory posture.

1. The court of appeals correctly held that the Tenth Amendment does not categorically bar respondent's action "to the extent that the EEOC seeks [petitioners'] compliance with the ADEA, as well as relief on behalf of Charles Lickteig and those similarly situated for ADEA violations." Pet. App. 21a. In *Wyoming*, 460 U.S. at 243, this Court held that Congress properly exercised its commerce authority in extending the ADEA to protect state employees from unlawful age discrimination, and that requiring state employers to comply with the ADEA does not unduly intrude upon state sovereignty under the Tenth Amendment. In *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), the Court recently reaffirmed that ruling. See *id.* at 78 ("In [*Wyoming*], we held that the ADEA constitutes a valid exercise of Congress' power '[t]o regulate Commerce . . . among the several States,' Art. I, § 8, cl. 3, and that the Act did not transgress any external restraints imposed on the commerce power by the Tenth Amendment.").

In a footnote, petitioners acknowledge "this Court's ruling in [*Wyoming*] upholding the enactment of the ADEA * * * and its reaffirmation of that ruling in [*Kimel*]." Pet. 14 n.4. Nevertheless, petitioners maintain that "[s]uch precedent is not dispositive" of their

argument that Congress cannot constitutionally require a state employer to observe the ADEA's basic mandate that both public and private employers refrain from unlawful age discrimination in providing retirement benefits to their employees. *Ibid.* Petitioners' argument that state employers are uniquely immune from federal regulation pursuant to the ADEA misconstrues this Court's Tenth Amendment jurisprudence, and was properly rejected by the courts below.

In *National League of Cities*, this Court held that the extension of the FLSA's wage and hour requirements to state and local government employers engaged in traditional governmental functions violated principles of state sovereignty under the Tenth Amendment. 426 U.S. at 852. Following that decision, the State of Wyoming challenged on Tenth Amendment grounds the application of the ADEA to state employers, "at least insofar as it regulated Wyoming's employment relationship with its game wardens and other law enforcement officials." *Wyoming*, 460 U.S. at 235. The Court recognized that "[t]he management of state parks is clearly a traditional state function," but concluded that "the degree of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities* so as to make it unnecessary for us to override Congress' express choice to extend its regulatory authority to the States." *Id.* at 239.

In applying the ADEA to Wyoming's mandatory retirement law, the Court explained that "the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard." *Wyoming*, 460 U.S. at 240. The Court contrasted the "wide-ranging and profound threat to the structure of state governance" that the *National League of Cities*

Court identified in requiring States to comply with the FLSA, *ibid.*, with the comparatively "minimal character of the federal intrusion" imposed on Wyoming's sovereign interests by the ADEA. *Id.* at 241-242 & n.17. Thus, even measured under the standard adopted in *National League of Cities*, the Court concluded that "[t]he extension of the ADEA to cover state and local governments, both on its face and as applied in this case, was a valid exercise of Congress' powers under the Commerce Clause," and was not proscribed by the Tenth Amendment. *Id.* at 243.[1]

Contrary to petitioners' suggestion (Pet. 14 n.4), in *Wyoming* the Court considered and rejected the State's argument that "eliminating mandatory retirement * * * would require the complete restructuring of the benefit program" for state employees, 460 U.S. at 241 n.15 (internal quotation marks omitted), and that application of the ADEA thus violated Wyoming's sovereign interest in "maintaining the integrity of the state pension system." *Id.* at 239 n.13. While the Court acknowledged that "the costs of certain state health and other benefit plans would increase if they were automatically extended to older workers now forced to retire at an early age," it pointed out that Congress had mitigated this economic burden on employers by including in the ADEA "a provision specifically disclaiming a construction of the Act which would require that

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[1] Following *Wyoming*, Congress amended the ADEA in 1986 to exempt from the general prohibition against age discrimination mandatory age limits for firefighters or law enforcement officers "in effect under applicable State or local law on March 3, 1983," the date *Wyoming* was decided. See 29 U.S.C. 623(j) (Supp. V 1999). As originally enacted, the exemption was temporary and expired in 1993. But Congress reenacted the provision as a permanent exemption in 1996, retroactive to the 1993 expiration date.

the health and similar benefits received by older workers be in all respects identical to those received by younger workers." *Id.* at 241-242 (citing 29 U.S.C. 623(f)(2)).[2]

Two years after *Wyoming*, the Court in *Garcia* v. *San Antonio Metropolitan Transit Authority*, *supra*, overruled *National League of Cities*, and held that extension of the FLSA's overtime and minimum wage requirements to cover state and local government employees "contravened no affirmative limit" imposed by the Tenth Amendment "on Congress' power under the Commerce Clause." 469 U.S. at 556-557. In *Garcia*, the Court "reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" *Id.* at 546-547. The *Garcia* Court held

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[2] When *Wyoming* was decided, the ADEA permitted "an employer * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the] Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * * [or] shall require or permit the involuntary retirement of any individual because of the age of such individual." See 460 U.S. at 242 n.16 (quoting 29 U.S.C. 623(f)(2)). The EEOC construed that proviso to allow an employer to reduce "benefit levels for older workers * * * to the extent necessary to achieve approximate equivalency in cost for older and younger workers." 29 C.F.R. 1625.10(a)(1). This Court invalidated that regulatory interpretation in *Public Employees Retirement System* v. *Betts*, 492 U.S. 158 (1989). Shortly thereafter, Congress amended the ADEA to permit an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i).

that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action." *Id.* at 556.

As the court of appeals below recognized, "*Garcia* established a far less stringent standard than that articulated in *National League of Cities* to determine whether federal legislation under the Commerce Clause impairs [S]tate sovereignty under the Tenth Amendment." Pet. App. 15a. Thus, given that the Court in *Wyoming* upheld the constitutionality of Congress' extension of the ADEA to state employers under the more sensitive Tenth Amendment analysis required by *National League of Cities*, this Court's subsequent adoption of a standard affording greater "respect for the reach of congressional power within the federal system," *Garcia*, 469 U.S. at 557, only "reinforce[s] the Court's determination in *Wyoming* that Congress is constitutionally authorized to require [S]tate employers to abide by the ADEA." Pet. App. 15a.

Petitioners fail to cite *Garcia*, and suggest no reason why claims similar to those rejected in *Wyoming* do not fail, *a fortiorari*, in light of *Garcia*'s replacement of *National League of Cities*. Cf. *South Carolina* v. *Baker*, 485 U.S. 505, 512-513 (1988) (rejecting Tenth Amendment challenge to federal registration requirements for state-issued bonds, and observing "that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless"). Instead, petitioners point to the legislative history of the Employee Retirement Income Security Act of 1974 (ERISA), and argue that the "same compelling con-

cerns of Federalism" that led Congress to exclude state pension plans from ERISA coverage, see 29 U.S.C. 1003(b)(1), barred Congress from requiring state employers to refrain from age discrimination in employee retirement plans. Pet. 17-18.

However, the statutory history of the ADEA demonstrates that Congress considered and represented the interests of the States in prohibiting public and private employers from discriminating against older workers, just as it did in enacting ERISA. Congress simply struck a different balance. In extending the ADEA to public employers, for example, Congress excluded from statutory protection elected officials and appointed policymakers at the state and local levels. See 29 U.S.C. 630(f). Moreover, when Congress amended the ADEA to clarify that the prohibition against unlawful age discrimination applies to all employee benefit plans, it provided an extended two-year period for States to bring an employee benefit plan that "may be modified only through a change in applicable State or local law" into compliance with federal law. See 29 U.S.C. 623 note.

Petitioners argue (Pet. 5-6) that "the determination of the eligibility for, and calculation of, State retirement benefits is an attribute of State Sovereignty" that lies beyond the constitutional bounds of "federal intrusion." That claim fails under the approach taken by the Court in *Garcia*, which rejected a Tenth Amendment analysis that sought "to articulate affirmative limits on the Commerce Clause power in terms of core governmental functions and fundamental attributes of state sovereignty." 469 U.S. at 556. But in any event, as discussed above, *Wyoming* establishes that, even under the more vigorous Tenth Amendment analysis of *National League of Cities*, petitioners could not demonstrate that

the ADEA's application to the State's employee retirement plan impermissibly intrudes on state sovereignty.

In addition, as amended, the ADEA permits an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i). Certainly, the degree of federal regulation of state interests in requiring compliance with the ADEA's "equal cost, equal benefit rule" is no greater than that which the Court permitted in *Wyoming*. See 460 U.S. at 242 & n.17.[3]

2. The court of appeals' decision in this case is also consistent with this Court's subsequent Tenth Amendment decisions. While ignoring *Garcia* and the clear import of *Wyoming*, petitioners rely on *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). Pet. 6-14. This Court has made clear, however, that the Tenth Amendment principles applied in those decisions do not govern challenges to Congress's authority "to subject state governments to generally applicable laws," such as the ADEA, by "subject[ing] a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160.

In *New York*, the Court considered a Tenth Amendment challenge to incentives provided in the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b *et seq.*, "to encourage the States to comply with their statutory obligation to provide for the

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[3] In addition, as the court of appeals noted below, petitioners provided "no evidence" to support the assertion that the alleged "intrusion into state sovereignty" in this case is more substantial than that involved in *Wyoming*. Pet. App. 15a.

disposal of waste generated within their borders." 505 U.S. at 152. New York argued that Congress had impermissibly commandeered the States to regulate in this field. Before addressing that claim, the Court distinguished its "recent cases interpreting the Tenth Amendment," which "concerned the authority of Congress to subject state governments to generally applicable laws," *id.* at 160 (citing, *inter alia*, *National League of Cities*, *Garcia*, *Wyoming*, and *Baker*), and stated that "[t]his litigation presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." Instead, the Court stated, *New York* "concern[ed] the circumstances under which Congress may use the States as implements of regulation." *Id.* at 160, 161.

Printz v. *United States*, 521 U.S. 898 (1997), is to the same effect. In that case, the Court applied the principles discussed in *New York* to invalidate an interim provision of the Brady Act requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers. Citing the holding in *New York* that "Congress cannot compel the States to enact or enforce a federal regulatory program," the Court in *Printz* held that "Congress cannot circumvent that prohibition by conscripting the States' officers directly." *Id.* at 935. *New York* and *Printz* thus establish that, under the Tenth Amendment, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Ibid.*

Drawing from *New York* and *Printz*, the court of appeals held that petitioners *are* entitled to Tenth Amendment immunity from any order requiring the State "to enact permanent legislation." Pet. App. 20a-21a. But *New York* and *Printz* provide no support for petitioners' claim that they are entitled to across-the-board immunity in this enforcement action because the ADEA touches on an area of state or local concern.

In *Reno* v. *Condon*, 528 U.S. 141 (2000), on which petitioners also rely (Pet. 12), this Court reaffirmed the distinction, for purposes of Tenth Amendment analysis, between a generally applicable federal law that regulates state activities in the same manner as private conduct, and a law designed to control or influence the manner in which States regulate private parties. *Condon* upheld the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721 *et seq.*, which "establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent." 528 U.S. at 144. The Court rejected the argument that the DPPA impermissibly "commandeered the state legislative and administrative process because many state legislatures had to amend a substantial number of statutes * * * and because state officials had to devote substantial effort" to comply with the federal requirements. *Id.* at 150. As the Court explained: "Such 'commandeering' is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Id.* at 150-151.

Like the generally applicable federal law upheld in *Condon*, and unlike the unique statutory provisions invalidated in *New York* and *Printz*, the ADEA does not attempt to control or influence the manner in which petitioner Commonwealth of Kentucky regulates private parties. The ADEA neither requires Kentucky, in its sovereign capacity, to regulate the conduct of private individuals or employers, nor commands Kentucky officials to enforce federal statutes regulating private conduct. Nor does the ADEA require Kentucky's legislature to enact specific laws or regulations, or even direct Kentucky to provide particular employment benefits to state employees. Rather, the ADEA regulates state employers in the same manner as private employers, by proscribing age-based discrimination against older workers in the terms and conditions of employment, including the provision of pension benefits. The ADEA in no way obligates a State to enact a disability retirement plan for its employees. But if a State chooses to do so, then it is subject to the same basic anti-discrimination principles under the ADEA that govern private employers who operate such plans.

To the extent that Kentucky is required, as a consequence of the EEOC's enforcement action, to decline to enforce or alter statutory provisions or policies that are inconsistent with the ADEA, this remedy does not unconstitutionally "commandeer" the State's legislative process in a manner comparable to the provisions invalidated in *New York* and *Printz*. Moreover, as the Court recognized in *Baker*, 485 U.S. at 514-515, and unanimously reaffirmed in *Condon*, 528 U.S. at 150-151, that type of relief is "an inevitable consequence of regulating a state activity." That the ADEA requires Kentucky, in operating any retirement plans for state

employees that it chooses to enact, to "take administrative [or] legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Condon*, 528 U.S. at 150, 151.

3. As presented to this Court, petitioners' Tenth Amendment claim also suffers from the uncertainties stemming from the current interlocutory posture of this litigation. For instance, petitioners argue (Pet. 10) that the court of appeals erred "in viewing the monetary damage award and affirmative relief sought in the EEOC Complaint in the abstract," and claim that the court of appeals also "should have considered what steps would be required to be taken by the Commonwealth in order to comply with a damage award and an injunction, and to avoid any further damage awards, by adopting specified policies, practices and programs." The need for such speculation, however, undermines rather than reinforces the case for review of petitioners' Tenth Amendment claim at this interlocutory stage.

The court of appeals held below that petitioners are entitled to Tenth Amendment immunity from any court mandate requiring the State "to enact permanent legislation." Pet. App. 21a. Any consideration of petitioners' claims that they are entitled to Tenth Amendment immunity from relief that would require the State to alter its program or practices short of such legislation would be premature, and unnecessary, until a court were able to evaluate those claims in light of a finding of liability on petitioners' part and a specific order granting relief. Only then would the Court be able to evaluate petitioners' claim in concrete terms against the Tenth Amendment principles established by this Court's precedents, the parties' arguments as to the

specific steps that petitioners in fact would be required to take to comply with that order, and the court's decision in this case barring relief that would require the enactment of permanent legislation.

4. The interlocutory nature of this case poses another, and even more serious, hurdle for petitioners. The court of appeals lacked jurisdiction to review the denial of petitioners' motion to dismiss on Tenth Amendment grounds because that interlocutory ruling is neither within the "small class" of decisions subject to immediate appeal under the "collateral order" doctrine, see *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), nor within the scope of any authority the court had to exercise "pendent appellate jurisdiction." See *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 40 (1995). That provides an independent reason to deny the petition.

The denial of a motion to dismiss grounded on the availability of Eleventh Amendment immunity from suit is subject to immediate interlocutory appeal under the collateral order doctrine. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The Eleventh Amendment confers on a non-consenting State the "privilege not to be sued" by a private party. *Id.* at 146 n.5. In the Eleventh Amendment context, this Court therefore applies the "same rationale" that justifies allowing an immediate appeal from the denial of a government official's claim of absolute or qualified immunity: "The entitlement is an *immunity from suit*, rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 144 (quoting *Mitchell* v. *Forsyth*, 457 U.S. 511, 526 (1985)).

The Tenth Amendment does not readily lend itself to that rationale. The "Tenth Amendment limits * * * Congress' authority to regulate state activities," *Baker*, 485 U.S. at 512, and thus embodies a restriction on federal statutory and regulatory power rather than an immunity from suit. In addition, unlike the State's Eleventh Amendment "privilege not to be sued," which "is for the most part lost as litigation proceeds past motion practice," *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 145, petitioners' Tenth Amendment arguments can be fully vindicated on appeal from a final judgment.

Petitioners' assertion that the Tenth Amendment insulates their pension plan from federal regulation pursuant to the ADEA affords them a defense to liability under the ADEA, but not immunity from suit by the federal government to enforce that statute. Like an argument that a federal statute violates the First Amendment, an argument that Congress ran afoul of the Tenth Amendment can be vindicated on final appeal. Because "[a]n erroneous ruling on liability may be reviewed effectively on appeal from final judgment," the denial of petitioners' motion to dismiss on Tenth Amendment grounds "was not an appealable collateral order." *Swint*, 514 U.S. at 43.[4]

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[4] In the court of appeals, respondent noted its objection to interlocutory appellate jurisdiction over petitioners' Tenth Amendment claim, but acknowledged that the court of appeals had recently exercised "pendent appellate jurisdiction" over an interlocutory appeal raising simultaneous claims of Tenth and Eleventh Amendment immunity. See *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862 (6th Cir.), cert. denied, 531 U.S. 816 (2000). In response, petitioners asserted that "the State's Tenth and Eleventh Amendment claims are inextricably intertwined in these appeals to form a unified attack against the EEOC Complaint,"

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and thus conferred appellate jurisdiction to review both claims of immunity. See KRS Reply Br. 2. The court of appeals did not address that argument. Now that petitioners have abandoned their Eleventh Amendment immunity claim, they are hard-pressed to argue that their Tenth and Eleventh Amendment claims are "inextricably intertwined" for purposes of conferring interlocutory appellate jurisdiction over their Tenth Amendment claim.

(3)

Supreme Court, U.S.
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No. 01-573

In the
Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, COMMONWEALTH OF KENTUCKY and JEFFERSON COUNTY SHERIFF'S OFFICE
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

The following question was presented in the Petition for Writ of Certiorari:

> Is the determination of the eligibility for, and calculation of, State retirement benefits an attribute of State Sovereignty which is constitutionally protected from federal intrusion?

In accordance with Supreme Court Rule 14(1)(a), this is the only question to be considered by the Court. The Rules do not allow a respondent to present additional questions to the Court. See Supreme Court Rule 15. Nonetheless, Respondent has attempted to do so herein. Petitioners object to such efforts and request the Court to confine its review to the question presented in the Petition for Writ of Certiorari.

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Kentucky Retirement Systems, the Commonwealth of Kentucky, and the Jefferson County Sheriff's Office (collectively referred to as "Kentucky Retirement") have petitioned for a Writ of Certiorari to review the August 2, 2001 Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed in part, reversed in part the May 4, 2000 Memorandum Opinion and Order and the September 25, 2000 Order entered by the United States District Court for the Western District of Kentucky. Kentucky Retirement seeks review of that portion of the Opinion which affirmed in part the judgment below. It files this Reply in response to the implicit challenge raised by the Equal Employment Opportunity Commission ("EEOC") to the remaining portion of the Opinion which reversed in part the judgment below and in response to the EEOC's contention that there are no compelling reasons to grant the Petition.

ARGUMENT

I. THE EEOC'S FAILURE TO FILE A CROSS-PETITION PRECLUDES IT FROM ASSERTING A CHALLENGE TO THE 6th CIRCUIT'S OPINION

The EEOC improperly seeks to raise a challenge to that portion of the Sixth Circuit Opinion whereby the Court exercised jurisdiction over the Tenth Amendment claims asserted by Kentucky Retirement and reversed in part the judgment below. It argues:

> The court of appeals lacked jurisdiction to review the denial of petitioners' motion to dismiss on Tenth Amendment grounds because that interlocutory ruling is neither within the 'small class' of decisions subject to immediate

> appeal under the 'collateral order' doctrine, nor within the scope of any authority the court had to exercise 'pendent appellate jurisdiction.' That provides an independent reason to deny the petition.

(Opposition Brief, p. 18) (citations omitted).

The EEOC's failure to file a Cross-Petition for a Writ of Certiorari precludes it from raising this challenge.

This Court has long required that a respondent file a Cross-Petition for a Writ of Certiorari as a prerequisite to seeking a reversal of the judgment below. See United States v. Reliable Transfer Co., 421 U.S. 397, 44 L. Ed. 2d 251, 95 S. Ct. 1708, 1711, n. 2 (1975) ("However, absent a cross-petition for certiorari, the respondent may not now challenge the judgment of the Court of Appeals to enlarge its rights thereunder."); National Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 85 L. Ed. 930, 61 S. Ct. 693, 697 (1941) ("But in the absence of a cross-petition for certiorari by respondent that question is not open here.").

The EEOC can not circumvent this procedural step by arguing that it is merely providing "an independent reason to deny the petition". (Opposition Brief, p. 18). If that "independent reason" could serve to reduce the petitioner's rights obtained in the judgment below, it must be supported by a Cross-Petition for a Writ of Certiorari.

> Without cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District

> Court or the Court of Appeals', provided that an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgment below.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 106 L. Ed. 2d 26, 109 S. Ct. 2782, 2788 (1989) (emphasis added) (citation omitted).

> A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment. A cross-petition is required, however, when the respondent seeks to alter the judgment below.

Northwest Airlines, Inc. v. County of Kent, Michigan, 510 U.S. 355, 127 L. Ed. 2d 183, 114 S. Ct. 855, 862 (1994). (emphasis added) (citation omitted).

As the EEOC concedes, it attempted to persuade the Sixth Circuit that it had no jurisdiction to hear the Tenth Amendment claims. Consistent with its prior precedent,[1] the Sixth Circuit rejected the EEOC's argument and exercised jurisdiction over both the Tenth and Eleventh Amendment claims. The court found merit in Kentucky Retirement's contention that the Tenth Amendment precludes the EEOC from directing the Commonwealth to enact permanent legislation. It accordingly reversed the "the district court's denial of immunity with regard to section D of the EEOC's prayer for relief" and held that "Defendants are entitled to

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[1] See Michigan Bell Tel. Co. v. Climax Tel. Co., 202 F. 3d 862 (6th Cir.), cert. denied, 531 U.S. 816 (2000).

Tenth Amendment immunity from a mandate that it 'enact permanent legislation.''' (Appendix A, p. 21a). If the unpreserved jurisdictional challenge proposed by the EEOC is accepted,[2] this ruling would necessarily be set aside. In accordance with Supreme Court Rules 14(1)(a) and 15 and this Court's prior precedent, the EEOC's argument should therefore not be heard.

In a similar situation, this Court in Northwest Airlines, Inc. v. County of Kent, Michigan, 114 S. Ct. 855, 862 (1994) refused to address a jurisdictional challenge which, if accepted, would have affected the entire judgment, reasoning:

> Alteration would be in order if the private right of action question were resolved in favor of the Airport. For then, the entire judgment would be undone, including the portion remanding for reallocation of CFR costs between the Airlines and general aviation. The Airport's failure to file a cross-petition on the CFR issue—the issue on which it was a judgment *loser*— thus leads us to resist the plea to declare the AHTA claim unfit for District Court adjudication.

Northwest Airlines, Inc. v. County of Kent Michigan, 114 S. Ct. 855, 862 (1994) (emphasis in original).

So too herein, acceptance of the EEOC's "independent reason" would necessarily reduce Kentucky Retirement's rights established under the judgment below.

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[2] Kentucky Retirement believes in fact that the challenge would be rejected. See Michigan Bell Tel. Co. v. Climax Tel. Co., 202 F. 3d 862 (6th Cir.), cert. denied, 513 U.S. 816 (2000).

Accordingly, in order to be properly preserved, the EEOC's argument must be supported by a Cross-Petition for a Writ of Certiorari. National Labor Relations Board v. Express Pub. Co., 61 S. Ct. 693, 697 (1941). Because it is not, the Court should refuse to consider it. Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782, 2788 (1989).

II. THE PETITION SEEKS A CLARIFICATION OF THE BOUNDARIES OF FEDERALISM IN THE CONTEXT OF A STATE RETIREMENT PLAN CREATED AND CONTROLLED BY A STATE LEGISLATURE

The EEOC additionally attempts to side track the Court by mischaracterizing Kentucky Retirement's argument on the merits. Kentucky Retirement does not contend that: "state employers are uniquely immune from federal regulation pursuant to the ADEA." (Opposition Brief, p. 8). To the contrary, Kentucky Retirement's Tenth Amendment challenge to the application of the ADEA to the State retirement plan is fact specific, posed in the limited context of a state-operated pension plan similar to many existing across the United States.

At issue is a retirement plan created by the Kentucky General Assembly years before the enactment of the ADEA. Under state law, Kentucky Retirement thereby entered into an inviolable contract with the members of the State retirement plan. See Section 19, Constitution of Kentucky; KRS 16.652; KRS 61.692 and KRS 78.852. Kentucky Retirement can not, as suggested by the EEOC, simply choose to do away with the retirement plan if it is unable to comply with the EEOC's construction of the ADEA. Unlike a private employer, it is

instead bound by the inviolable contract created through the existing statutes.

To further compound the dilemma, Kentucky Retirement can take no steps to comply with the EEOC's demands without a revision to the state statutory scheme. The terms of the State retirement plan, including those specifically challenged by the EEOC, are contained in the Kentucky Revised Statutes. Any revisions to those terms must come from the General Assembly through the enactment of additional legislation.

Indeed, the entire focus of this litigation is, and has from the outset been, on the EEOC's contention that it is entitled to demand a revision of the State statutory scheme. The EEOC alleged in its Complaint that that portion of the Kentucky Revised Statutes wherein the General Assembly defined the eligibility requirements under the retirement plan was violative of the ADEA. The EEOC's demand for injunctive relief and monetary damages was premised upon the contention that Kentucky Retirement's past compliance with the Kentucky Revised Statutes was a corresponding unlawful employment practice under the ADEA. The EEOC recognized that the only way to remedy this alleged violation was to obtain an order from the court compelling the General Assembly to revise the Kentucky statutory scheme.[3]

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[3] The EEOC's claim before this Court that one can not yet determine what steps would be necessary to enforce a judgment against Kentucky Retirement if the EEOC should prevail on the merits is contradicted by its own pleadings. It requires no speculation to determine that there must be a revision to the state statutory scheme in order to satisfy the EEOC's demands.

In light of this background, Kentucky Retirement's Petition queries, if, as the Sixth Circuit Court of Appeals held, the Tenth Amendment prohibits the EEOC from compelling the General Assembly to enact "permanent legislation", why does it not just as equally prohibit the EEOC from demanding injunctive relief and monetary damages which can not be satisfied without the enactment of the same compelled legislation. The logical conclusion to be drawn is that either way, the EEOC is seeking to commandeer the Kentucky General Assembly. The Tenth Amendment does not allow it to do so. New York v. United States, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408, 2420 (1992).

The EEOC chastises Kentucky Retirement for relying on this Court's most recent Tenth Amendment precedent, arguing that this question must be judged against National League of Cities v. Usery, 426 U.S. 823, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976); Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983) and Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985). The EEOC places particular significance on the absence of a discussion of Garcia in the Petition. Garcia, however, is not the last word in this Court's analysis of the Tenth Amendment restraints over the relationship between the federal government and the States. To the contrary, there has been a continuing evolution of the Tenth Amendment precedent since Garcia. For that reason, Kentucky Retirement relied on this Court's most recent analysis of the balance between state and federal powers as presented in New York v. United States, 112 S. Ct. 2408 (1992); United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995) and Printz v. United States, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997). Under the current standard recognized in these decisions "if a power

is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power that the Constitution has not conferred on Congress." New York v. United States, 112 S. Ct. 2408, 2417 (1992) (citation omitted). Kentucky Retirement maintains that the determination of the eligibility for, and calculation of, State retirement benefits is such an attribute of States Sovereignty which is not subject to federal intrusion.

The EEOC counters that these more recent decisions are distinguishable and can not be read to extend to this particular fact pattern. Kentucky Retirement disagrees. In any event, Kentucky Retirement does not believe that this Court has completed its assessment of the boundaries of Federalism as defined in the Tenth Amendment. In his dissent in Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005, 1033 (1985), Justice Rehnquist expressed the belief that the principles of Federalism recognized in the pre-Garcia precedent would in time "again command the support of the majority of this Court." Justice O'Connor likewise indicated that she shared in this belief. Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. at 1037. Kentucky Retirement respectfully urges the Court that the time has now arrived to address this issue anew and set forth a more definitive standard.

The facts presented in this appeal are particularly ripe for a renewed endorsement of Federalism. Kentucky Retirement has an inviolable contract with its eligible employees guaranteeing a program of retirement benefits where once one is eligible for an unreduced retirement benefit, whether by years of service, age, or a combination of attained age and years of service, the employee no longer is eligible for a disability retirement. The EEOC dismisses the significance of such a contract, arguing that if the General

Assembly fails to enact new legislation revising such contract, Kentucky Retirement should simply ignore the State statutory scheme in order to bring it in compliance with the EEOC's construction of the ADEA. Such result compelled by the judiciary is just as much a commandeering of the Kentucky General Assembly as an order of the court directing that specific legislation dictated by the EEOC be enacted. Either way, the legislative will of the Commonwealth will be subverted in an area in which the federal government has no legitimate interest.

Under such circumstances, Kentucky Retirement urges the Court to grant the Petition and address this question which impacts state-operated pension plans across the United States.

CONCLUSION

For these reasons, along as those set forth in the Petition for Writ of Certiorari, Kentucky Retirement Systems, Commonwealth of Kentucky and Jefferson County Sheriff's Office urge the Court to grant the Petition for Writ of Certiorari and address the issue of whether the determination of the eligibility for, and calculation of, State retirement benefits is an attribute of State Sovereignty reserved to the States by the Tenth Amendment.

Respectfully submitted on this the 12th day of December, 2001.

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